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INTRODUCTION

"Executive lawmaking is central to modern governance."[1] While this fact seems to be at odds with the Constitution, the Supreme Court of the United States (Supreme Court) has recognized that, in today's "complex society," Congress "cannot do its job" unless it has the power to delegate its legislative authority under "broad general directives."[2] The Supreme Court, in its 1984 landmark decision, *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, declared that courts shall defer to an agency's reasonable interpretation of an ambiguous statute that Congress has empowered the agency to administer.[3] This deferential standard of review has been abused by presidential administrations and has been reduced to a tool of statutory interpretation at the

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1. Gary Lawson, *Representative/Senator Trump?*, 21 CHAP. L. REV. 111, 116 (2018).

2. Mistretta v. United States, 488 U.S. 361, 372 (1989).

3. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

agency level.[4] Without any check in place to discourage this, Congress has been able to avoid the laborious legislative process by empowering agencies to enact rules that decide questions Congress is unable to resolve through the legislative process. The Supreme Court's response to this practice is the so-called "major questions doctrine."[5] This doctrine has been invoked few times, and some scholars even question its existence.[6] Assuming it does exist, the Supreme Court has never articulated a standard for when the doctrine is properly invoked, creating confusion among scholars and the federal circuit courts.

This Comment attempts to articulate when the major questions doctrine applies and argues that, without further guidance from the Supreme Court, the doctrine is rather toothless. Part I of this Comment discusses *Chevron* deference and illustrates why there should be a check on its scope. Part II provides a background of the major questions doctrine. Part III explains how the doctrine is, in effect, toothless, and why it will remain so without further guidance from the Supreme Court concerning when it applies.

I. *CHEVRON* DEFERENCE

In *Chevron*, the Supreme Court articulated a new standard of review for agency interpretation of statutes. This framework is two-part. First, if "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear, . . . courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[7] However, if the statute is "silent or ambiguous," courts must defer to an agency's "permissible construction of the statute."[8] This decision was premised on the belief that Congress sometimes implicitly delegates legislative authority to agencies to "fill any gap left" in a particular statute.[9] In such a case, the Supreme Court held, "a court may not substitute

4. *See* Gary Lawson, *Dirty Dancing—The FDA Stumbles with the* Chevron *Two-Step: A Response to Professor Noah*, 93 CORNELL L. REV. 927, 937 (2008).

5. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

6. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 673 (7th ed. 2015).

7. *Chevron*, 467 U.S. at 842–43.

8. *Id.* at 843.

9. *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[10]

The impact that *Chevron* has had on American government cannot be understated. It is now the most cited Supreme Court case concerning administrative law and has fundamentally altered the legislative process. This Part explains how *Chevron* has birthed a legislative process that is less democratically accountable and illustrates why there should be a check on its scope.

A. Chevron *has divested power from Article III courts to the executive branch.*

The Constitution vests the Supreme Court with the exclusive power to say what the law is, and the *Chevron* doctrine undermines this authority.[11] A statute that Congress has authorized an agency to administer may have countless "reasonable" interpretations, and these interpretations may vary drastically depending on the presidential administration. Who is to decide which of the many reasonable interpretations is the "correct" one? Under *Chevron*, it is up to the agency. Even if the Supreme Court would find that the best interpretation of a statute contradicts an agency's interpretation, so long as the agency's interpretation is a "reasonable" one, the agency is free to ignore the judgement of the Court, which would have found the agency's interpretation unlawful. This is a result that Justice Scalia found "not only bizarre," but "probably unconstitutional."[12]

Chevron is formally a "standard of review," but is functionally a misguided "tool of statutory interpretation at the agency level."[13] Judicial deference is "premised on the initial decision maker's good-faith effort to get the right answer."[14] Therefore, it would be inappropriate "for an agency to use *Chevron* deference as a tool to protect its initial law findings."[15] As inappropriate as it may be, agencies under *Chevron* are empowered to make it their "mission"

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10. *Id.* at 844.
11. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
12. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).
13. *See* Lawson, *supra* note 4, at 930.
14. *Id.* at 932.
15. *Id.* at 932–33.

to find a "'reasonable,' rather than correct, interpretation" of a statute in order to advance policy objectives embraced by the incumbent presidential administration.[16] According to Justice Thomas, "[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress."[17] Permitting politically-motivated agencies to resolve difficult policy questions necessarily creates a risk for consequential misuse of *Chevron* at the agency level.[18]

Chevron has also changed the role of the executive branch. The president of the United States has fairly little power over domestic affairs, as prescribed in the Constitution, and "must have statutory authority in order to act" in the "domestic, social, and economic realms."[19] But now, presidents are increasingly promoting the use of agencies as an "extension of [their] own [executive] policy and political agenda."[20] Indeed, "[w]e live today in an era of presidential administration."[21] The number of pages in the Code of Federal Regulations is nearly four times that of the Unites States Code.[22] Agencies have legislative, executive, and judicial functions; without "requirements of quorums, cloture, or majority votes to stand in the way of [presidential] lawmaking," presidents have found it advantageous to carry out their political agenda through agencies.[23] It cannot be doubted that "executive lawmaking is central to modern governance."[24]

One may wonder how *Chevron* is implicated in this phenomenon. Imagine that a liberal Congress passes a statute that promotes a liberal agenda, and that the statute is signed by the

16. *See id.* at 937.

17. Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

18. *See* Lawson, *supra* note 4, at 933.

19. Coal. for Responsible Reg., Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting); *see* U.S. CONST. art. II, § 2.

20. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

21. *Id.*

22. Lawson, *supra* note 1, at 116.

23. *Id.* at 118.

24. *Id.* at 116.

president and made into law. If a conservative president's political agenda is founded on dismantling the liberal statute, and if she does not have the support of Congress, she may attempt to undermine legislative intent through executive agencies. She may direct agencies enabled to promulgate the law to find "permissible" interpretations of key provisions in a way that weakens the statute. So long as the new interpretation is "reasonable," courts cannot second-guess this interpretation. Without clear canons of statutory interpretation that guide a court's analysis (i.e., if a court should only look at the text of the statute or look to other things, such as legislative history), whether an agency's interpretation is judged "reasonable" may vary widely based on a number of factors. With the potential for such great deference, it is not unfair to say that *Chevron* has enabled presidents, in effect, to "rewrite" laws concerning domestic matters in a way that is favorable to their political agenda while evading constitutionally prescribed forms of lawmaking in a manner that bears a resemblance to the unconstitutional "line item veto."

Some would argue that these grievances are misplaced and should be aimed at the administrative state in general, and not *Chevron*.[25] To be clear, *Chevron* did not create the current administrative state, but it has strengthened it. It is true that *Chevron* is only a standard of review, but it is a standard of review that permits politically motivated, non-elected officials to interpret the words of Congress, which were adopted in a laborious and bicameral way, in a manner that favors the current presidential administration. *Chevron* permits the possibility that an agency may "reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail."[26] In the words of Justice Gorsuch, then a Circuit Judge of the United States Court of Appeals for the Tenth Circuit, *Chevron* "seems to have added prodigious new powers to an already titanic administrative state."[27]

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25. *See* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017).

26. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

27. *Id.* at 1155.

B. Chevron *weakens Congress's legislative process.*

Legislating is a laborious process. Under the Constitution, enacting legislation requires the agreement of the House of Representatives, the Senate, and the president. If either chamber of Congress disagrees with a piece of legislation, it cannot become law. If both chambers agree and the President does not agree, legislation can only become law if two-thirds of both chambers of Congress override the President's veto. Such an override is a legislative feat; as of 2014, among the more than 2,500 presidential vetoes in American history, only five percent have been overridden.[28] Further, members of Congress are elected directly by the people.[29] Legislating is a conciliatory process, and the Constitution guarantees that this already laborious process is driven by a sense of accountability—if people are unhappy with Congress's job performance, they may express their frustration through the democratic process. This is all to say that the Constitution demands that legislation be made through the most democratically accountable process. *Chevron* diminishes this accountability by permitting agency executives to "exploit ambiguous laws as license for their own prerogative."[30]

Chevron enables and encourages Congress to bypass the constitutionally mandated requirements of passing legislation. Reelection is among the most important factors that underlie the decisions of Congressional members,[31] whose chances of reelection are dependent on public opinion. *Chevron* enables Congress to draft statutes with "ambiguous language to reduce legislative delays caused by continued debate over statutory terms and shift the political costs of undesirable decisions from legislators . . . to bureaucrats."[32] That allows members of Congress to take credit for positive aspects of a regulatory scheme and distance themselves from unfavorable aspects.[33] While such a system surely expedites the legislative process, accountability is diminished because heads

28. *Veto*, HISTORY, https://www.history.com/topics/us-government/veto (last updated Aug. 21, 2018) [https://perma.cc/T7JS-FPJE].

29. U.S. CONST. art. I, § 2; *id.* amend. XVII.

30. *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

31. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 5 (1990).

32. Bednar & Hickman, *supra* note 25, at 1455.

33. *Id.*

of agencies are not directly accountable to the people. *Chevron* encourages "[a] form of Lawmaking Made Easy,"[34] where Congress need not debate controversial statutory terms that agencies now may provide themselves.

Consider how this plays out in practice. *Coalition for Responsible Regulation, Inc. v. EPA*, dealt with the Environmental Protection Agency's (EPA) "implementation of the Prevention of Significant Deterioration provisions of the Clean Air Act."[35] The Clean Air Act was "designed to maintain state and local compliance with the National Ambient Air Quality Standards" (NAAQS).[36] "The NAAQS are . . . established for six air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide."[37] The "statute requires stationary facilities that emit certain air pollutants to obtain permits before beginning new construction."[38] The relevant issue before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) was whether the term "air pollutant" for the purposes of the statutory permitting requirement gave EPA power to regulate greenhouse gases such as carbon dioxide in addition to pollutants identified in the NAAQS.[39] The court found that EPA could regulate greenhouse gases such as carbon dioxide.[40]

Justice Kavanaugh, at that time a Circuit Judge of the D.C. Circuit, dissenting along with Judge Brown, would have found that EPA did not possess the authority to read the statute so broadly.[41] According to the dissenters, the CAA received extreme scrutiny during the legislative process, was crafted with "great specificity and care," and the issue of whether to regulate greenhouse gases was fully contemplated by Congress and was rejected, as evidenced by the fact that "hundreds of bills concerning greenhouse gases

34. *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring).

35. Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting). The opinions cited are related to the denial of a petition for rehearing en banc. *Id.* at *1 (per curiam).

36. *Id.* at *14 (Kavanaugh, J., dissenting).

37. *Id.*

38. *Id.* (citing 42 U.S.C. §§ 745(a)(1), 7479(1)).

39. *Id.*

40. *See id.* at *2 (Sentelle, C.J., concurring).

41. *Id.* at *14 (Kavanaugh, J., dissenting).

regulation were proposed and rejected between 1990 and 2009."[42] In his dissent, Judge Brown found that the court's decision impermissibly empowered EPA to "steamroll through Congressional gridlock."[43] Further, Judge Brown would have found that the major questions doctrine prohibited such a delegation of power.[44] The majority found that the statute at issue unambiguously conferred upon EPA the power to regulate greenhouse gases, but Justice Kavanaugh would have found that the "EPA ha[d] exceeded its statutory authority."[45]

II. THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine is the Supreme Court's attempt at limiting the scope of *Chevron*. It should be noted that some scholars question its existence: Professor Gary Lawson, for example, questions whether all of the relevant case holdings may be explained on more "mundane grounds without positing a free-floating but unstated 'major issues' inquiry."[46] It is notable that this doctrine has never been stated in express terms by the Supreme Court.[47] There is not even a consensus on what it is called. Most scholars call it the "major questions" doctrine; Professor Lawson sometimes refers to it as the "major issues" doctrine, and Justice Kavanaugh refers to it as the "major rules" doctrine. This Comment assumes that it does exist and refers to it as the major questions doctrine, which is consistent with the vernacular used by the Supreme Court in its adoption. This Part provides an overview of the cases that have invoked the doctrine and attempts to articulate a standard for when it applies under current case law.

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42. *Id.* at *5–6 (Brown, J., dissenting).
43. *Id.* at *5.
44. *See id.* at *12.
45. *Id.* at *14 (Kavanaugh, J., dissenting).
46. LAWSON, *supra* note 6, at 673.
47. It should be noted that on June 20, 2019 the United States Supreme Court decided *Gundy v. United States*, in which a dissenting opinion, written by Justice Gorsuch and joined by Chief Justice Roberts and Justice Thomas, briefly discusses the major questions doctrine. *See* 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting). It is notable that *Gundy* concerned review under the nondelegation doctrine and *Chevron* was not implicated. *See id*. at 2121 (majority opinion). Justice Kavanaugh did not participate in the consideration or decision of the case.

The major questions doctrine was first clearly invoked by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corporation*.[48] There, the Food, Drug, and Cosmetic Act (FDCA) granted the Food and Drug Administration (FDA) authority "to regulate, among other items, 'drugs' and 'devices.'"[49] The FDA interpreted this as giving it the authority to regulate tobacco products, reasoning that nicotine is a "drug" and cigarettes are "devices" that deliver nicotine.[50] In its *Chevron* "step one" analysis, the Supreme Court found that its "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[51] The opinion went on to state that "Congress is more likely to have focused upon . . . major questions, while leaving interstitial matters [for agencies to address]."[52] The Court reasoned that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," but in extraordinary cases, there should be hesitation before presuming that Congress intended an implicit delegation.[53] Such hesitation was warranted in *Brown & Williamson Tobacco Corporation* where the FDA had asserted jurisdiction to "regulate an industry constituting a significant portion of the American economy."[54] After *Brown & Williamson Tobacco Corporation*, the elusive major questions doctrine is said to have been invoked, though implicitly, in only a couple of Supreme Court decisions.[55]

One such case is *Gonzales v. Oregon*, which concerned whether the Attorney General of the United States could interpret a regulation—promulgated by the Attorney General himself—in a

48. 529 U.S. 120 (2000). The doctrine can even be traced back to *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994).

49. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

50. *Id.* at 127.

51. *Id.* at 159.

52. *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

53. *Id.*

54. *Id.*

55. *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 790, 793–94 (2017); *e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014); Gonzales v. Oregon, 546 U.S. 243 (2006).

way that restricted the use of controlled substances for physician-assisted suicide.[56] The Controlled Substances Act gave the Attorney General the authority to "de-register" physicians if the Attorney General determined that this would be in the "public interest."[57] The Attorney General's own regulation required that prescriptions for controlled substances "be issued for a legitimate medical purpose."[58] The issue before the Court was whether an interpretative statement issued by the Attorney General declaring that assisting suicide is not a "legitimate medical purpose" and is "inconsistent with the public interest," thus subjecting doctors engaged in this practice (who were authorized to do so by Oregon law) to suspension or revocation of their medical licenses, was entitled to *Chevron* deference. Quoting *Brown & Williamson Tobacco Corporation*, the Court found that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[59] The Court reasoned that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes," and that "the idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable."[60]

Another such case is *Utility Air Regulatory Group v. EPA*, in which the Supreme Court considered the same issue before the D.C. Circuit in *Coalition for Responsible Regulation, Inc*: whether EPA had the authority to regulate greenhouse gases under the Clean Air Act.[61] Justice Scalia, writing for the majority, took Justice Kavanaugh's position that the Clean Air Act did not "compel" EPA's proffered "interpretation" that it had authority to regulate greenhouse gases.[62] While the Court did not speak of "major questions," it quoted the familiar language of *Brown & Williamson Tobacco Corporation*:

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56. *Gonzales*, 546 U.S. at 248–50.
57. *Id.* at 251.
58. *Id.* at 250.
59. *Id.* at 267.
60. *Id.* (quoting Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 458 (2001)).
61. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2434 (2014).
62. *Id.* at 2439.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[63]

The challenged regulation would have subjected "smaller industrial sources" that were not previously regulated, such as "residential buildings, hotels, large retail establishments, and similar facilities," to the "stationary sources" permitting requirements.[64] The Court struck down the regulation, finding it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[65] Hence, EPA was not entitled to *Chevron* deference because it impermissibly answered a "major question" without clear congressional authorization.[66]

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63. *Id.* at 2444.

64. *Id.* at 2436 (citing 73 Fed. Reg. 44,420, 44,498–99 (2008)).

65. *Id.* at 2444.

66. For "completeness," in the words of Justice Kavanaugh, another case warrants mention: King v. Burwell, 135 S. Ct. 2480 (2015). U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421 n.2 (2017) (Kavanaugh, J., dissenting). In *King*, the Supreme Court reviewed whether the Internal Revenue Service (IRS) could promulgate a rule that interpreted Section 36B of the IRS Code, which "allows an individual to receive tax credits only if the individual enrolls . . . through 'an Exchange established by the State under [42 U.S.C. § 18031],'" as making available tax credits to a person enrolled in "an Exchange" regardless of whether the Exchange is established by a State. *King*, 135 S. Ct. at 2488–89. The Court refused to afford the IRS *Chevron* deference, despite finding that 42 U.S.C. § 18031 (as set out in Section 36B of the IRS Code) is ambiguous, because the tax credits involved billions of dollars in annual spending and the IRS had "no expertise in crafting health insurance policy of this sort." *See id.* at 2488–91.

Though this decision seemingly invokes the major questions doctrine, Justice Kavanaugh takes the position that the case "stand[s] for the distinct proposition that *Chevron* deference may not apply when an agency interprets a major government . . . appropriations provision of a statute." *U.S. Telecom Ass'n*, 855 F.3d at 421 n.2. This position is supported by others, like Professor Sohoni, who agree with Justice Kavanaugh and assert that *King* should be "understood to be confined to [its] domain." An agency may not claim "that a statute implicitly delegates to the agency the power to cause large amounts of federal money to be spent." Mila Sohoni, King*'s Domain*, 93 NOTRE DAME L. REV 1419, 1422, 1433 (2018). When *King* is viewed in that light, it is apparent that it is "somewhat different from the prototypical major rules cases because

The major questions doctrine cannot be understood through precise mechanical application. Though the Court in *Brown & Williamson Tobacco Corporation* supposedly invoked this doctrine at step one, the doctrine stands for the proposition that Congress does not implicitly delegate to agencies the authority to promulgate "major" rules that decide important questions that Congress itself should have resolved.[67] Because the major questions doctrine limits whether *Chevron* applies at all, *Brown & Williamson Tobacco Corporation* "seem[s] to be [a] Step Zero decision[] in Step One Guise."[68] Moreover, in *Utility Air Regulatory Group*, the Court's language in finding that (1) the Clean Air Act did not "compel" EPA's rule, and (2) that EPA's rule was unreasonable, seems like a Step Two decision. The major questions doctrine should thus be understood by its most basic lesson as illustrated in the aforementioned cases: "If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action."[69]

III. THE MAJOR QUESTIONS DOCTRINE IS A TOOTHLESS JUDICIAL TOOL

The sparse and inconsistent invocation of the major questions doctrine illustrates that it is a toothless judicial tool when it comes to limiting the scope of *Chevron*. This Part argues that the major questions doctrine has been largely ineffective at limiting the scope of *Chevron* and advocates for guidance from the Supreme Court that articulates a clear standard for when *Chevron* applies.

Given that major legislation has been struck down by the major questions doctrine, one may be surprised to learn the words "major questions doctrine" do not appear in any Supreme Court decision,

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the agency in that particular rule was not seeking to regulate or de-regulate (as opposed to tax or subsidize) some major private activity." *U.S. Telecom Ass'n*, 855 F.3d at 421 n.2. If *King* and the other major questions cases are "lump[ed] together," according to Professor Sohoni, "the consequence will be [for courts] to skip the other major questions cases forward—to Step Zero—and thereby unnecessarily erode *Chevron's* domain." Sohoni, *supra* at 1433.

67. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000); Coenen & Davis, *supra* note 55, at 781 n.9 (2017).

68. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 248 (2006).

69. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421 (2017) (Kavanaugh, J., dissenting).

and are found in only two dissenting opinions from the D.C. Circuit: *Coalition for Responsible Regulation, Inc.* and *United States Telecom Association*.[70] In both cases, the majority upheld delegations of power assumed by the respective agencies and, in both dissenting opinions, Justice Kavanaugh advocated for the invocation of the major questions doctrine. Justice Kavanaugh explained the major questions doctrine at length in *United States Telecom Association v. FCC*, and his dissent illustrates how the doctrine is rather toothless.

In *United States Telecom Association,* the D.C. Circuit denied petitions for rehearing en banc of a ruling upholding the Federal Communications Commission's (FCC) 2015 Open Internet Order, also known as the "Net Neutrality Rule" (the Rule).[71] The case addressed the proper regulatory classification of broadband internet service under the Communications Act.[72] Congress enacted the Communications Act in 1934 and amended it in 1996.[73] It was "originally designed to regulate telephone service providers as common carriers."[74] The Act "authorizes heavy common-carrier regulation of telecommunications services but light regulation of information services."[75] Before the Rule, the FCC regulated internet service provided over cable systems as an information service, the lighter regulatory model, and it treated broadband (cable) differently than digital subscriber line (DSL).[76] The FCC classified DSL as a "telecommunications service" for the purposes of the Communications Act while classifying broadband as an "information service."[77] Telecommunications providers are treated as "common carriers" that must afford neutral and nondiscriminatory access to their services and avoid unjust and unreasonable practices.[78] Information services are not considered

70. *Id.* at 383 (Srinivasan, J., concurring); Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *9 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting).

71. *U.S. Telecom Ass'n*, 855 F.3d at 382 (Srinivasan, J., concurring).

72. *Id.* at 383.

73. *Id.* at 394 (Brown, J., dissenting).

74. *Id.* at 424 (Kavanaugh, J., dissenting).

75. *Id.*

76. *Id.* at 383 (Srinivasan, J., concurring).

77. *Id.* at 383–84 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975, 978, 1000 (2005)).

78. *Id.* (citing *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 975–76, 1000).

"common carriers" and are subject to less regulation and oversight.[79] "[T]he [Communications] Act is ambiguous about whether internet service is an information service or a telecommunications service."[80] By classifying internet service as a telecommunications service, the FCC imposed "onerous common-carrier regulations on internet service providers."[81]

Justice Kavanaugh would have struck down the rule because, in his view, it is a "major rule" that Congress had not clearly authorized the FCC to promulgate.[82] According to Justice Kavanaugh, an agency may promulgate "major rules," but only if Congress has clearly authorized it to do so; conversely, he opined that "[i]f a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful."[83] While there is no bright-line test for what constitutes a "major rule," several factors are relevant, including "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[84] The doctrine, according to Justice Kavanaugh, stands on two presumptions: "(i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch . . . and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[85] In sum, "while the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."[86]

In support of his contention that the Rule was "major," Justice Kavanaugh emphasizes that there was a huge political debate about net neutrality: Congress had debated regulation for years.[87]

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79. *Id.* at 384 (citing *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 975–76).

80. *Id.* at 424 (Kavanaugh, J., dissenting).

81. *Id.* at 425.

82. *Id.* at 417.

83. *Id.* at 419.

84. *Id.* at 422–23 (citing Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2443–44 (2014)).

85. *Id.* at 419 (citing Indus. Union Dep't, AFL-CIO v. Am. Petroleum Ins., 448 U.S. 607, 645–46 (1980)).

86. *Id.*

87. *Id.* at 423. Justice Kavanaugh provided a litany of legislative examples to underscore the intensive debate on net neutrality. *See id.*

When the FCC proposed the Rule it received over four million comments from the public.[88] Even President Obama publicly weighed in on the issue, which was highly unusual.[89] The Rule "fundamentally transforms the Internet by prohibiting Internet service providers from choosing the content they want to transmit to consumers and from fully responding to their customers' preferences."[90] Further, the Rule "will affect every Internet service provider, every Internet content provider, and every Internet consumer."[91] "The financial impact of the rule—in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business—is staggering."[92] Given these circumstances, Justice Kavanaugh forcefully argued that "[t]he net neutrality rule is a major rule under any plausible conception of the major rules doctrine" and "any other conclusion would fail the straight-face test."[93]

Justice Kavanaugh took great care to explain the significance of the major questions doctrine and the importance that it has in American government. The fact that judges presume "Congress does not delegate its authority to settle or amend major social and economic policy decisions" is fundamental to maintaining the Constitution's separation of powers.[94] The doctrine recognizes that "a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation."[95] Justice Kavanaugh's dissent even discusses an empirical study that found that the doctrine "reflects congressional intent and accords with the in-the-arena reality of how legislators and congressional staff approach the legislative function" because drafters "don't intend to leave [major policy questions] unresolved."[96] The major questions

88. *Id.*

89. *Id.* (Kavanaugh, J., dissenting) (citing Statement by the President on Internet Neutrality, 2014 DAILY COMP. PRES. DOC. 841 (Nov. 10, 2014)).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 424 (quoting Brown, J., dissenting at 402).

94. *Id.* at 422 (quoting WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016)).

95. *Id.* (quoting ESKRIDGE, *supra* note 94, at 289)).

96. *Id.* at 423 (quoting Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013)).

doctrine, therefore, acts as a safeguard to ensure that Congress is the final authority when it comes to answering major political questions and that the Executive Branch does not use congressional inaction as a license to "legislate" on its own. This is consistent with constitutionally prescribed democratic values and, thus, it is inappropriate for judges to afford *Chevron* deference to agencies that use statutory ambiguity as a *source* for their authority to promulgate "major" rules.

Justice Kavanaugh's opinion makes one thing crystal clear: the major questions doctrine is rather toothless. "If the Supreme Court's major rules doctrine means what it says, then the net neutrality rule is unlawful . . . ."[97] Justice Kavanaugh found striking parallels between the facts of *United States Telecom Association* and the "major questions" test set out in *Brown & Williamson Tobacco Corporation* and applied in *Utility Air Regulatory Group*.[98] Notably, the FCC's use of the Communications Act of 1934 as the source for its authority to reclassify broadband internet service seems much like "an agency claim[ing] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy."[99] In the words of Justice Kavanaugh, "[t]he Court in [*Utility Air Regulatory Group*] might as well have been speaking about the net neutrality rule."[100]

United States Telecom Association represents the kind of executive lawmaking that the major questions doctrine is intended to prohibit. If the Rule is not one of vast "economic and political significance" then it is difficult to imagine where the line is drawn. According to Justice Kavanaugh, "[t]he FCC adopted the net neutrality rule because the agency believed the rule to be wise policy and because Congress would not pass it."[101] This is precisely what his colleague Judge Brown cautioned about in *Coalition for Responsible Regulation*: Agencies using congressional inaction as a

97. *Id.* at 418.
98. *See id.* at 424.
99. *Id.* (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).
100. *Id.*
101. *Id.* at 426.

license to "steamroll through congressional gridlock" to make policy that they—agencies headed by unelected bureaucrats—endorse.[102]

The major questions doctrine will remain toothless so long as the Supreme Court fails to invoke it in explicit terms and clearly articulate what constitutes a "major question." Even Justice Kavanaugh concedes that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."[103] This is troubling, and *United States Telecom Association* may be the most egregious example of a court permitting an executive agency to answer a question that Congress lacked the political will to answer through Article I legislation. In his criticism of *Chevron*, Justice Gorsuch quoted Justice Frankfurter's observation that "'[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions imposed' by the Constitution."[104] Executive agencies have an inherent incentive to disregard the restrictions imposed by the Constitution, and the major questions doctrine was created to act as a check on agencies' asserted authority. After all, "[a]mbition must be made to counteract ambition."[105] A Supreme Court decision that explicitly invokes the major questions doctrine will not only make clear to agencies the bounds of their authority but will also force Congress to "speak clearly" when it wishes for agencies to resolve major questions while simultaneously ensuring that the "gaps" that Congress "implicitly" intends for agencies to fill are actually implicit.

IV. POSSIBLE SOLUTIONS

The major questions doctrine will remain a toothless doctrine so long as the Supreme Court fails to invoke it in explicit terms and clearly articulate what constitutes a "major question." Of course, the major questions doctrine is a judicially created response to the judicially created problem that is *Chevron*. A more sensible

102. *See* Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *5 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting).

103. *U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

104. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)).

105. THE FEDERALIST NO. 51 (James Madison).

solution is for Congress to address this problem through legislation. After all, *Chevron* is not a Constitutional decision and may be overridden by an act of Congress. This Part discusses these options in turn.

A. *The Supreme Court should clearly embrace the major questions doctrine.*

The most obvious solution to the ineffectiveness of the major questions doctrine is for the Supreme Court to clearly embrace the doctrine. The doctrine stands for an important exception to congressional delegation and it goes to the heart of American exceptionalism: "a major policy change should be made by the most democratically accountable process."[106] It will remain a toothless "shadow doctrine" unless the Supreme Court gives it the credence that other doctrines of similar importance have received.[107]

Litigants cannot expect to avail themselves of a doctrine that has only been meaningfully discussed in dissenting opinions. The majority in *United States Telecom Association* correctly observed that it was "unsurprising that none of the petitioning parties, no member of the original panel . . . and neither of the dissenting Commissioners objected to the FCC's Order as infringing [the major rules] doctrine."[108] While the concurrence questioned whether that was so because the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services* foreclosed such an argument, it was more likely attributable to the doctrine's objectively obscure foundation and lack of supporting precedent.[109]

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106. *United States Telecom Ass'n*, 855 F.3d at 422; WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288–89 (2016).

107. The term "shadow doctrine" has been used to describe judicially created rules with minimal bases that are not very well fleshed out. *See, e.g.*, George Washington Univ. v. D.C, 318 F.3d 203, 209 (D.C. Cir. 2003).

108. *United States Telecom Ass'n*, 855 F.3d at 387.

109. *Id.* In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Court afforded *Chevron* deference to the FCC's construction of the Communications Act of 1934 that exempted broadband cable companies from compulsory common-carrier regulation. 545 U.S. 967, 980 (2005). In *United States Telecom Ass'n*, Justice Kavanaugh took issue with the FCC's position that the *source* of its authority to implement net neutrality is the ambiguity that the *Brand X* Court found in the Communications Act of 1934. According to Justice Kavanaugh, "finding of statutory ambiguity is a

The D.C. Circuit—often hailed as the second most important court after the Supreme Court—has struggled to apply the doctrine. In *Coalition for Responsible Regulation, Inc.*, the concurrence did not expressly mention the doctrine over Judge Brown's dissent that called for its invocation to prevent EPA from "steamroll[ing] through Congressional gridlock" without clear authorization.[110] In *United States Telecom Association*, the concurrence acknowledged the doctrine but in a manner that could hardly sound more than disingenuous. The concurrence referred to the major questions doctrine as "a doctrine [Justice Kavanaugh] gleans from certain Supreme Court decisions."[111] The majority refused to "resolve" the "existence or precise contours" of the doctrine, and discussed it, *arguendo*, only as the dissenters "expounded it."[112] While the doctrine is considered by many scholars to be of exceptional importance, it will have little impact if a panel of judges on the D.C. Circuit dismiss it as though Justice Kavanaugh himself invented it.[113]

Given the unwillingness of lower courts to meaningfully consider the major questions doctrine, it is now apparent that only the Supreme Court can change the existing narrative. The Court missed an opportunity in *Utility Air Regulatory Group* when, although the majority took Justice Kavanaugh's position that the Clean Air Act did not "compel" EPA's proffered "interpretation" that it had the authority to regulate greenhouse gases, the Court did not expressly invoke the doctrine.[114]

In fact, a Supreme Court decision that, at a minimum, expressly acknowledges the major questions doctrine may be imminent. Justice Gorsuch has expressly called for *Chevron* to be reconsidered, and Justice Kavanaugh, of course, has been the sole, staunch advocate of the major questions doctrine from the bench.

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bar" to an agency's authority to promulgate "major rules." 855 F.3d at 425 (Kavanaugh, J., dissenting).

110. *See* Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, at *5 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting).

111. *United States Telecom Ass'n*, 855 F.3d at 383 (Srinivasan, J., concurring).

112. *Id.*

113. *See id.* ("Our colleague understands those decisions to give rise to a 'major rules' doctrine.").

114. *See* 573 U.S. 302, 315 (2014).

Now that Justice Gorsuch and Justice Kavanaugh have been elevated to the Supreme Court, a decision concerning *Chevron* and its limitations is almost certain to come. Even if Justice Kavanaugh finds himself, once again, arguing for the invocation of the doctrine in a dissenting opinion, the majority will have to respond to his argument and finally shed some light on this "shadow doctrine."[115]

B. *Congress can enact legislation that limits the authority of agencies.*

Of course, Congress could simply enact legislation that limits the authority of agencies. *Chevron* effectively shifted legislative power to the executive branch and the major questions doctrine functions to ensure that major assertions of authority, by the executive branch, have been vetted through Article I legislation. Congress, being a co-equal branch of government to the executive and judiciary, should be expected to protect its power; however, legislation to that effect appears unlikely.

Perhaps dissatisfaction with *Chevron* should be redirected to Congress's complacency with the decision. It has been argued that Justice Stevens's opinion in *Chevron* "worked to discourage unconstitutional delegations of power by putting Congress on notice that, if it delegated power, its institutional rival, the President, would be empowered and not the congressional oversight committees and subcommittees."[116] The thriving administrative state—coupled with Congress's willingness to regularly defer its legislative authority to agencies—suggests that *Chevron* has not had the deterrent effect that Justice Stevens may have hoped for.

A sensible congressional response, according to Professor Garrett, would be legislation in the form of "a broad statute allocating the law-interpreting power to either agencies or courts with respect to all questions of ambiguous language, or perhaps assigning the power to agencies in certain defined circumstances (such as when they use particular procedures) and to courts in all

115. In *Gundy* v. *United States*, despite the major questions doctrine being discussed by the dissent, the majority did not respond because (1) the case did not concern *Chevron*; and (2) the dissent did not advocate for the doctrine's invocation. *See* 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

116. Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 545 (2012).

other instances."[117] This is seemingly advantageous to Congress, as it has technical advantages over courts in understanding agency action and resolving relevant ambiguities through "its institutional design, access to experts, repeat interactions with the agency, and a more comprehensive perspective."[118] Such a move by Congress, however, appears unlikely.

While encouraging a system of separation of powers that stays true to the Framers' intent is clearly a judicial priority, evidence suggests that Congress is increasingly committed to its evolving role in law execution. "As a matter of practice, Congress has carved out for itself a huge role in law execution through the oversight and appropriations process."[119] This role is hampered by lengthy debate over legislation and *Chevron*, in effect, takes that pressure off Congress. One facet of the problem is that Congress "desire[s] to sometimes avoid making difficult political decisions or use open-textured language to garner majority support for controversial bills."[120] Thus, it appears that Congress is less concerned with protecting its unique legislative power from its institutional rival, the executive branch, than it is with taking advantage of a "form of Lawmaking Made Easy," where Congress need not debate controversial statutory terms that agencies now may provide themselves.[121] Without congressional motivation to assert itself as the only constitutionally delegated lawmaking authority, it is clear that the burden to limit the scope of *Chevron* rests on the shoulders of the Supreme Court.

CONCLUSION

The major questions doctrine was created to "face the behemoth" of *Chevron,* but it has largely failed. It has failed because the Supreme Court has not invoked it in clear and express terms, and consequently, lower courts have either struggled to apply it or avoided it altogether. Without further guidance from the Supreme Court, Congress will continue to evade the laborious

117. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2660 (2003).

118. *Id.* at 2654.

119. Calabresi et al., *supra* note 116, at 537.

120. Garrett, *supra* note 117, at 2660.

121. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

legislative requirements imposed by the Constitution by permitting agencies—headed by bureaucrats not directly accountable to the people—to make major decisions that Congress itself has failed to make. A Supreme Court decision that explicitly invokes the major questions doctrine will not only make clear to agencies the bounds of their authority, but it will also force Congress to "speak clearly" when it wishes for agencies to resolve major questions while further ensuring that the "gaps" that Congress "implicitly" intends for agencies to fill are actually implicit.